renders. And it is believed that the latter type of immorality was in the legislative mind and not the former. The former is occasional, inconspicuous and not habitual, and does not obtrude upon public notice. The statute, as it is now construed to embrace cases like the instant case, places men of high standing who have merely erred against a sound rule of moral conduct in the same category with men who are so lost to all sense of shame that they are willing to live upon the income from a woman's prostitution. Everybody knows that there is a difference between the occasional immoralities between men and women and the systematized and mercenary immorality expressed in the statute's graphic phrase *"White Slave Traffic."*

Again, while the construction given the statute in the instant case will doubtless discourage that which is at worst no more than a misdemeanor; yet it will encourage blackmailing, which is, and ought to be, a felony. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by the Supreme Court as a weapon with which to enforce their felonious demands. This result is grave, and should influence the courts to reject a construction which leads to such mischievous consequences, if the statute be, as it is, susceptible to another construction.

APPORTIONMENT OF CORPORATE DIVIDENDS BETWEEN LIFE TENANTS AND REMAINDERMEN.—This question has been before the courts more continuously, probably, than any other single point during the last century. Where a trust estate of corporate stock is established, with the direction to give the "income," "dividends" or "profits" to A for life with remainder to B, a dispute often arises between the life tenant and the remainderman as to whether the dividends constitute a part of the income and therefore belong to the life tenant, or whether they constitute a part of the corpus of the estate, and pass to the remainderman. The question usually arises under the provisions of a will. It is a generally accepted principle that the intention of the testator, where it can be gathered from the instrument creating the trust, will govern the disposition of the dividends by the corporation.[1] Generally, however, no intention is expressed, and upon the courts devolves the duty of deciding who is entitled to them. It is with this class of cases that this discussion is concerned. We may also eliminate from consideration those cases where the dividend is based, not on the earnings, but on the proceeds of the sale of part of the plant or original property, or where they represent nothing more than the natural growth or increase of the value of the permanent property. Such distributions are uniformly held to be part of the corpus of the estate,[2] except

[1] Spooner *v.* Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 416; In re James, 146 N. Y. 290, 40 N. E. 876.

[2] Heard *v.* Eldridge, 109 Mass. 258, 12 Am. Rep. 687; Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116; Holbrook *v.* Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768; Kalback *v.* Clark, 133 Iowa 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801.

where the corporation is one whose sole object is to buy and hold real estate to sell at a profit.[3]

The earliest English cases laid down the doctrine that the life tenant was entitled only to the regular yearly dividends, and that all extraordinary dividends, whether paid in cash or stock, went to the remainderman.[4] The House of Lords approved this doctrine and followed it.[5] The inclination of the courts of that day to favor entails, perpetuities and accumulations of property doubtless played no small part in establishing this doctrine. The rule, however, was not strictly adhered to in all the earlier cases.[6] In the case of *Bouche* v. *Spoule*,[7] which settled the question in England, the House of Lords limited the application of the early doctrine to those corporations which cannot increase their capital stock, but have accumulated a surplus which is used as *de facto* capital. As to corporations which can increase their capital stock, the decision depends upon whether they have in fact capitalized their profits by issuing stock representing the surplus. If this is done the new stock is held to be a part of the principal of the estate and goes to the remainderman. A cash dividend, though special and extraordinary, represents income and goes to the life tenant.[8] The substance rather than the form of the dividend will control in deciding whether it is a cash dividend or a stock dividend.[9]

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[3] Oliver's Estate, 136 Pa. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894.

[4] Brander *v.* Brander, 4 Ves. Jr. 800. In the later case of Irwin *v.* Houston, 4 Paton Sc. App. 521, Lord Rosslyn, who had decided Brander *v.* Brander, said that at first he had thought it necessary to ascertain what part of the bonus had accumulated before the testator's death and what part afterwards; but that the bank had been much alarmed at that intention, and that upon mature consideration he had decided that the whole bonus was part of the capital. Apparently much of this alarm has been communicated to some of the courts.

[5] Irwin *v.* Houston, *supra.* The corporation was the Bank of Scotland, which by its charter could not increase its capital stock; but from year to year it used the accumulated earnings as *de facto* capital, or "floating capital," as the Chancellor called it. The court held that since it had been treated as capital, though not actually capitalized, it should be treated as part of the corpus of the estate when it was distributed even in the form of cash.

In a later case though the doctrine was followed the Chancellor said that he had some difficulty in determining the principal on which it rested. Paris *v.* Paris, 10 Ves. Jr. 185. This case has been often cited as holding that the distinction between the cash dividend and stock dividend was "too thin" to form the basis of different holdings in respect to them. It will be noticed that the stock to which he referred was not the stock of the same company which had declared the dividend, but annuities. It is held everywhere that where the distribution is not the stock of the corporation itself but stock of another corporation or certificates representing assets the dividend is treated as a cash dividend; therefore the words of the Chancellor do not in fact mean what they purport on their face to say.

[6] Price *v.* Anderson, 155 Sims 473; Preston *v.* Melvin, 16 Sims 163.

[7] L. R. 12 App. Cas. 397.

[8] In re Alsbury, L. R. 45 Ch. Div. 237.

[9] Jones *v.* Evans, 107 L. T. N. S. 606, 1 Ch. 23, 57 Sol. J. 60, 19 Mason 397.

The so-called Massachusetts rule coincides with the English rule, the question being made to turn upon the nature of the dividend declared by the corporation. Cash dividends, however large, are regarded as income; and stock dividends, however made, as capital.[10] The question in every case is whether the distribution made by the corporation is of cash or of stock to be held as an investment in the corporation.[11] The courts admit that in some cases this arbitrary rule works injustice; but they seek to justify it on the grounds that some simple rule is necessary; that it would be impracticable to ascertain what has been earned by the corporation after the time at which the life estate became effective—in order to work out an exact adjustment of the rights and interests of the life tenant and the remainderman; and, further, that substantial justice is meted out in most cases.[12] This rule has been closely followed; but care has been taken in the later cases to look more to the substance of the transaction than to its form in deciding whether the surplus has been in fact capitalized, making the transaction amount to the declaration of a stock dividend.[13] These courts follow the Massachusetts rule: United States Supreme Court,[14] Connecticut,[15] Rhode Island,[16] Illinois,[17] Georgia (by statute),[18] and perhaps Virginia.[19]

In Pennsylvania the Massachusetts doctrine is expressly repudiated, as being based on an unsound principle. The courts of that state hold that the act of the directors in deciding what kind of a dividend it shall be cannot be allowed to decide who, as between the life tenant and the remainderman, is entitled to it. They hold that the corpus of the life estate consists of the par value of the stock plus a proportionate part of the accumulated earnings as they stand at the date of the commencement of the trust estate. Therefore, all profits subsequently accumulated constitute a part of the income, and should go to the life tenant. These courts look to the circumstances to decide how much of the profits represented by the dividend were earned before and how much afterward, and appor-

[10] Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705.
[11] D'Ooge *v.* Leeds, 176 Mass. 558, 57 N. E. 1025.
[12] Lyman *v.* Pratt, 183 Mass. 58, 66 N. E. 423.
[13] Hyde *v.* Holmes, 198 Mass. 289, 84 N. E. 318; Gray *v.* Hemenway, 206 Mass. 126, 92 N. E. 31, 138 Am. St. Rep. 377; Talbot *v.* Milliken, 221 Mass. 367, 108 N. E. 1060.
[14] Gibbons *v.* Mahon, 136 U. S. 549. It is of interest to note that Mr. Justice Gray, who rendered the decision in this case, was the judge on the Massachusetts court when it decided the case of Minot *v.* Paine, *supra,* which may account for the similarity of reasoning in the two opinions. This is the only case in which the Supreme Court has passed upon this point.
[15] Spooner *v.* Phillips, *supra;* Union & N. H. Trust Co. *v.* Taintor, 85 Conn. 452, 83 Atl. 697.
[16] Newport Trust Co. *v.* VanRensselaer, 32 R. I. 231, 78 Atl. 1009, 35 L. R. A. (N. S.) 563.
[17] Billings *v.* Warren, 216 Ill. 281, 74 N. E. 1050.
[18] Jackson *v.* Maddox, 136 Ga. 31, 70 S. E. 865.
[19] This case is only persuasive authority, if that. Kaufman *v.* Charlottesville Woolen Mills Co., 93 Va. 673, 25 S. E. 1003.

tion it accordingly. The general rule that there is no apportionment of periodical payments is one of convenience; and while it is applied in the case of ordinary dividends—because, the amounts being small, it leads to no substantial injustice—yet it must give way in behalf of equity when it works hardship in the distribution of extraordinary dividends.[20] This doctrine has never been questioned in Pennsylvania.[21] The Pennsylvania rule is followed in these states: Maine,[22] New Hampshire,[23] New York,[24] New Jersey,[25] Delaware,[26] Maryland,[27] Tennessee,[28] South Carolina,[29] Iowa,[30] Minnesota,[31] Wisconsin [32] and Vermont.[33]

What was formerly known as the New York rule, but is now known as the Kentucky rule, seems as unreasonable as the Massachusetts rule; since it goes to the other extreme. The first New York cases were concerned with cash dividends of unusual and extraordinary nature. The court held that the time at which the distributed earnings were made was immaterial and would not be considered, and that no apportionment should be made. They said that the evident intent of the testator must have been to have all dividends derived from the stock go to the life tenant; since he must know that no profits could arise or income accrue to the holder of the stock until ascertained and distributed by the company; and that this act must have been in the mind of the testator, and not the earnings and profits as ascertained by a computation or investigation of the affairs and business of the corporation by the court.[34] It may be seen that thus far, though moved by different reasoning, this rule is the same as the Massachusetts rule; and, indeed, Massachusetts cases were cited to support it. However, when the courts came to consider stock dividends they expressly and absolutely repudiated the Massachusetts rule. They held that a distribution of stock was a division of the earnings, just as a distribution of cash, and that there is no real distinction in the form of the dividend.[35] The influence of the earlier cases

[20] Earp's Appeal, 28 Pa. 368.
[21] Appeal of Boyer, 224 Pa. 144, 73 Atl. 320; In re Stokes' Estate, 240 Pa. 277, 87 Atl. 971.
[22] Gilkey *v.* Paine, 80 Me. 319, 14 Atl. 205.
[23] Holbrook *v.* Holbrook, *supra.*
[24] In re Osborne, 209 N. Y. 450, 103 N. E. 723, 50 L. R. A. (N. S.) 510, Ann. Cas., 1915A, 298.
[25] Ballantine *v.* Young, 79 N. J. Eq. 70, 81 Atl. 119.
[26] Bryan *v.* Aiken (Del.), 86 Atl. 674, 45 L. R. A. (N. S.) 477.
[27] Foard *v.* Safe Deposit & Trust Co. (Md.), 89 Atl. 724.
[28] Pritchett *v.* Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.
[29] Wallace *v.* Wallace, 90 S. C. 61, 72 S. E. 553.
[30] Kalback *v.* Clark, *supra.*
[31] Goodwin *v.* McGaughy, 108 Minn. 248, 122 S. W. 6.
[32] Soehnlein *v.* Soehnlein, 146 Wis. 330, 131 N. W. 739.
[33] In re Heaton's Estate (Vt.), 96 Atl. 21.
[34] Hyatt *v.* Allen, 56 N. Y. 553; In re Kernochan, 104 N. Y. 618, 11 N. E. 149.
[35] McLough *v.* Hunt, 154 N. Y. 179, 48 N. E. 584, 33 L. R. A. 230.

moved the courts to hold that there could be no apportionment and that the whole dividend, whether cash or stock, went to the life tenant.[36] Kentucky follows the same rule and awards all dividends to the life tenant without apportionment,[37] and the rule was approved in a recent case.[38] Kentucky now stands alone in support of this doctrine. New York, after hedging,[39] departed from her original holding—though the law was laid down as a *ratio dicendi*—and adopted the Pennsylvania rule of apportionment. Notwithstanding the somewhat added inconvenience of practical administration of trust estates, the inequity of the other rule was so great in many cases as to shock the sense of justice and could not be adhered to. Regular dividends are not apportioned; but in the case of extraordinary dividends, where the accumulation of years is distributed, each case must stand on its own facts, and the dividend must be apportioned in accordance with equity.[40] The cases decided since recognize and apply this rule.[41]

Since the decisions in the various jurisdictions are in such hopeless and irreconcilable conflict, a review of the principles upon which the different rules rest may be not without profit. Those which uphold the Massachusetts rule reach their conclusion by the following reasoning: A corporation is a legal entity separate and distinct from the shareholders. The legal title to all property, profits and accumulated earnings is in the corporation. The directors may, within their discretion, retain their earnings in the business, if they deem it necessary to the more successful prosecution of affairs. It is only when the dividend has been declared that the stockholder has any right to demand any part of the earnings. A cash dividend separates a certain amount from the corporate aggregate and distributes it, so that the money passes for all time out of the possession of the corporation and becomes the property of the shareholder. A stock dividend represents a capitalization of the profits which from that time on becomes a part of the permanent part of the corporate property and can never be distributed. No property or money passes. The corporation has, immediately after the declaration of the stock dividend, exactly what it had before, and has parted with nothing. The shareholder owns just what he owned before and has acquired nothing, the only difference being that his interest in the corporation is represented by a larger number of certificates of a correspondingly decreased value. Therefore, a stock dividend is a part of the corpus of the trust estate

[36] Lowry *v.* Farmers' L. & T. Co., 172 N. Y. 137, 64 N. E. 796; Robertson *v.* DeBrulatour, 188 N. Y. 301, 80 N. E. 938.

[37] Hite *v.* Hite, 93 Ky. 257, 20 S. W. 778, 4 Am. St. Rep. 189, 19 L. R. A. 173.

[38] Cox *v.* Gaulbert's Trustee, 148 Ky. 407, 147 S. W. 25.

[39] Thayer *v.* Burr, 201 N. Y. 155, 94 N. E. 604; In re Harteau, 204 N. Y. 292, 97 N. E. 726.

[40] In re Osborne, *supra.*

[41] In re Cooper, 144 N. Y. Supp. 189; In re Affleck, 146 N. Y. Supp. 835; In re Tod, 147 N. Y. Supp. 161.

and should go to the remainderman, while the cash dividend represents the income and should belong to the life tenant.

This argument is more technical than equitable, and is of the same type of logic as that which led the chancellor in an old English case of partition between joint tenants to award to the plaintiff the whole stack of chimneys, all the fire places, the only stair case in the house and all conveniences of the yard.[42] This argument is based on a false premise. It fails to distinguish "capital" as regards the corporation and its stockholders from "capital" or "corpus" of the trust fund. The word has an entirely different meaning when used in the one relation from that which it has when used in the other. The corporation owns property—its capital: the stockholder owns stock—his capital. The corpus of the trust estate should be ascertained by looking to the value of the stock at the commencement of the trust, *i. e.*, the par value of the stock plus a proportionate part of the accumulated profits as of this date. The shareholder cannot and does not own any part of the corporate property, not even the earnings, until they are set apart in the form of dividends. When dividends are declared, whether in cash or in stock, they are but a distribution of profits which have been made by the use of corporate capital in the prosecution of its business. Recognizing the absolute right of a corporation to increase its capital and retain its earnings in the business, and of determining for itself what shall be its capital, its action in the matter cannot preclude the court from determining what, as between a life tenant and a remainderman, is really income and what is the corpus of the estate. If the corporation had paid small cash dividends year by year, there could be no possible controversy as to their ownership. Then why, merely because the directors have decided to retain these profits and accumulate the earnings over a number of years and at last declare a dividend of stock which represents such earnings, should the ownership of them be changed?

The Massachusetts courts assert that it must have been the intention of the testator that the determination of what is to be income must depend upon the regular activities of the corporation in regard to its shares; since he must be presumed to have had in view the lawful power of the corporation over its earnings, and if his intentions had been otherwise he would have expressed them. This view does violence to the most fundamental principles of interpretation of wills. It says that, because the testator—through ignorance, mistake or negligence—fails to provide expressly for a situation which in all probability never occurred to him at the time he made his will, he intended for a body of men, acting absolutely independently of the will and in ignorance of the circumstances and moved by entirely remote considerations, to decide who should get the benefit of the estate. It could easily happen that during a period of expansion the company might issue a series of stock dividends. Can it be presumed that the testator intended to put it

[42] Turner *v.* Morgan, 2 Ves. 145.

in the power of the directors to beggar his wife and children for the benefit of the remainderman, whom the testator may never have seen? It is true that it must be left with the directors to decide when a dividend shall be declared; but the testator knows that the corporation will not accumulate the profits long without distributing their value in some form among its shareholders. A stock dividend declared during his life would have represented to him income from his original investment. Would it not be much more reasonable to presume that he intended the life tenant to hold it as he had held it, save that any profits that had accumulated before his death would, as to the life tenant, represent principal and that all increase, whether distributed in stock or in cash, would go to the life tenant?

The Massachusetts rule has long been commended for its simplicity and convenience. It may well be doubted whether it possesses even these virtues. Even under the harsh application of the earliest cases, the court had to go behind the declaration and review the circumstances to ascertain whether the assets distributed arose from the natural increase in value or disposition of corporate property. The later cases go even farther than this, and do not allow the form of the declaration to govern, but look to see whether the transaction was, in substance, a disposition of income or corporate capital.[43] Thus, it would seem that the courts which follow this doctrine experience as much difficulty in applying this as those which follow the Pennsylvania rule. Under any circumstances, the hardship which it works should override all considerations of convenience. The Pennsylvania rule has proven practical and reasonable and places no considerable difficulty before those courts which apply it.

The rule of no apportionment seems to be no longer of much importance. Kentucky is the only state which follows it. New York,

[43] Heard *v.* Eldridge, *supra;* Leland *v.* Hayden, 102 Mass. 542. The corporation with profits accumulated after the creation of the trust estate purchased some of the shares of its own stock and bought other property and then increased its capital stock offering one new share at par to the owner of every five shares of the old stock. It also declared a dividend of 40 per cent. from its surplus earnings, 20 per cent. to be paid in the old shares of the company, 20 per cent. in cash to be derived from the sale of the newly created shares, the court, saying that the principal was well settled that all cash dividends went to the life tenant and all stock dividends went to the remainderman, reached the paradoxical conclusion that the 20 per cent. paid in old stock was a cash dividend and went to the income of the trust while the 20 per cent. paid in cash was a stock dividend and went to the corpus of the estate. The question whether a dividend is of stock or cash is determined by the substance and intent of the transaction; now the shares of the old stock distributed represented cash invested from the accumulated earnings; the dividend did not affect the value of the shares outstanding relatively to the whole capital stock; while in form a stock dividend it was in substance and effect a cash dividend. The other dividend, however, while in form a cash dividend was substantially a dividend paid in new shares; the issue of the new stock affected the relative value of the old shares; they increased the nominal value of the corporate property.

disgusted by the hardship it worked in many cases, has discarded it. There are only two cases upon the subject in Kentucky, and it may with safety be assumed that when a hard case arises for the decision of the court it will follow New York's example. The trend of modern cases has been away from the Massachusetts rule, and one jurisdiction after another has adopted the Pennsylvania view. It has ever been the tendency of the common law to pattern its rules according to the changing necessities of society and weed out those which are found to work inequity. Even the Massachusetts courts have moderated their original holding. The rule is too firmly planted in some states to be changed by anything but legislative enactment. May it remain confined to those states and not spread elsewhere to defeat the intent of testators and deprive widows of their rightful legacies.

VERIFICATION OF AFFIDAVIT OR INFORMATION IN CRIMINAL CONTEMPT PROCEEDINGS.—The peculiar nature of the offense places the procedure in contempt cases in a class of its own. In proceedings for contempt the distinction between direct and constructive contempt is quite obvious, the mere mention of the distinction being a sufficient explanation.[1] Direct contempt consists of acts done in the presence of the court, which may be punished summarily, without the formalities incident to the proceedings for contempt committed out of the presence of the court, the latter possessing characteristics of an ordinary trial. Constructive contempts are usually instituted upon affidavit or information setting forth the alleged contempt, and it seems well settled by the authorities that a mere statement charging the contempt is insufficient. The purpose of the affidavit is to inform the defendant of the charge, and is similar in its nature to a criminal information. Whether this affidavit must be upon personal knowledge of the affiant or is sufficient if upon information and belief is the question to be discussed.

In the recent case of *Creekmore* v. *United States* (C. C. A.), 237 Fed. 743, the defendant was found guilty of contempt of court on an information verified by a United States district attorney to the effect that the facts stated were true and correct upon information and belief, the offense being specifically and particularly charged in detail. The Circuit Court of Appeals (8th Circuit), after reviewing all the authorities, held that the information was sufficient, even though not upon the personal knowledge of the affiant. It seems to be the general opinion of the text-writers throughout the United States that an affidavit upon information and belief upon which to base constructive contempt proceedings is wholly insufficient, and the court will not acquire

[1] For a discussion of principles governing proceedings for civil contempt as distinguished from criminal contempt, see 2 VA. LAW REV. 265.